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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 816

CITY OF MILWAUKEE; J. J. KRUEGER, CITY TREASURER OF THE CITY OF MILWAUKEE; COUNTY OF MILWAUKEE; AND C. M. SOMMERS, COUNTY TREASURER OF MILWAUKEE COUNTY,

Petitioners,

vs.

UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF.

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Petitioners,

vs.

UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY,

Respondents.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

PETITION FOR WRIT OF CERTIORARI.

The petitioners above named respectfully pray for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review a judgment of that court entered January 20, 1944. The certified copy of transcript of record in the case, including the proceedings of the Circuit Court of Appeals, has been filed herewith in accordance with **Rule 38 of this Court.**

History of the Litigation.

The suit was instituted by the respondents in the United States District Court for the Eastern District of Wisconsin to enjoin petitioners from assessing, levying and collecting general ad valorem taxes upon the Federally-owned Parklawn low-cost housing premises located in the City and County of Milwaukee; to have the 1941 taxes (before District Court judgment 1942 taxes were levied) declared null and void; and for declaration that the lands are exempt from taxation while owned by the Government.

The cause was heard upon motions of the parties for judgment on the pleadings. The District Court in written opinion (T. R. 37-42), 49 Fed. Supp. 436, ordered judgment in favor of respondents, which was duly entered (T. R. 42-43).

Upon appeal the Circuit Court of Appeals affirmed such judgment January 20, 1944 (T. R. 61-65).

The petitioners now seek to have reviewed by this court the novel and undeniably important questions of law involved.

Jurisdiction.

Jurisdiction of this court is invoked pursuant to Section 240 (a) of the Judicial Code as amended by Act of Congress of February 13, 1925 (U. S. C. A., Title 28, Sec. 347), and Rule 38, 5(b) in that the courts below decided an important question of Federal law which has not been, but should be, settled by this court, and that there is drawn in question the validity of a Wisconsin Statute, Section 70.11 (1), as amended by Chapter 86, Laws of Wisconsin for 1941, which by its terms took away from the United States exemption from taxation for improved residential income-producing property, and the courts below held such 1941 amendment to be repugnant to the United States Constitution.

Statement of the Matter Involved.

This is a case of first impression. This court has never expressly passed upon the tax immunity of a rental income-producing public low-cost housing project in respect to which the United States and one of its instrumentalities acts as a landlord in a proprietary capacity and receives from tenants annual rentals of approximately $135,000 and offers to the State, County and City $6,970 per annum in lieu of general real estate taxes on the 40-acre tract and improvements levied at approximately $44,066 for the city and $23,591.95 for the county, as per 1941 and 1942 assessments and levies.

By reason of motions of all parties for judgments in their respective favor, the material facts are all admitted and undisputed.

The United States acquired title to the Parklawn premises in 1935. Dwelling houses to accommodate 518 families were constructed and completed ready for occupancy about September 1, 1937; after the enactment of the 1941 amendment to the Wisconsin Statutes the local taxing authorities assessed and levied taxes for the city and county in the respective sums above mentioned. The petitioners demanded payment of the taxes and assert that the taxes were valid and enforceable. The project was established pursuant to the General Welfare Clause of the United States Constitution and certain provisions of the National Industrial Recovery Act approved June 6, 1933, as amended June 29, 1936, with funds appropriated by Congress, Title 40, Chap. 8, Secs. 421 to 423, U. S. C. A. (49 Stat. 2026); the lands were purchased by the United States in 10 separate parcels from the then owners, private individuals or corporations that for many prior years had paid the taxes (T. R. 5, 23-24).

The Government does not have any public office and never performed on the premises a governmental function, excepting only as the local manager handled the renting of the houses to tenants; the houses have been almost fully occupied by rent-paying tenants since 1937; among the residents are several hundred minors aged 4 to 19 who attend the public schools of the city erected and maintained at the expense of the local taxpayers; no school has ever been erected on the premises by the Government; the city operates and maintains numerous services for the benefit of the owners of real estate and all residents within the city by laying out, maintenance and repair of streets and alleys; sewage disposal; other sanitary, public health, hospital and clinic services; fire and police protection; garbage collection and disposal; and public educational and other services, at an annual cost as applied to Parklawn lands and residents alone of about $130,000, derived from general taxes, special taxes, state and county aids, license and permit fees, and other sources; the Government pays the city only for the water service (T. R. 6, 24-25).

The county furnishes services by way of administration of justice and law enforcement, maintaining courts of record, public institutions for the care of the mentally handicapped and orphaned minors, general and emergency hospitals and clinics for the treatment of ill and injured persons unable to pay for the same, by way of support of the unemployables and unemployed, by maintenance of public park and recreational facilities, and other substantial services for which the county annually expends large sums of money derived from the levy of general taxes.

The state renders numerous services for the benefit of all real estate and all residents in the state by maintaining public educational, penal, hospital, sanitarium, judicial, law enforcement and other institutions, and in the administration of the state government, and expends annually large

sums of money therefor, derived in part from the state-wide general tax levies; and the state and county annually contribute substantial sums of money to the city, derived from state income and gasoline taxes and other sources, for the support of the city schools and city government.

The United States and its Housing Authority became a landlord and engaged in business for gain and profit and competes with the taxpaying private owners of rented and rentable apartment and other dwelling houses. The Parklawn dwellings are not needful buildings as mentioned in Section 8 of Art. I, U. S. Const.

The Government never owned and never contemplated owning, in Wisconsin or elsewhere, at the time of the adoption of the U. S. Const., or at any time thereafter up to about 1933, nor in 1846 to 1848, at the time of admission of Wisconsin into the Union, and the adoption of the Wisconsin Const., any residential income-producing real estate similar to Parklawn.

Up to May 9, 1941, Section 70.11 Wis. Statutes, provided exemption from taxation for property "owned exclusively by the United States." Effective May 9, 1941, this exemption statute was amended by Chapter 86 of the Laws of 1941, so as to repeal the exemption provision as related to Federally-owned residential income-producing property.

In 1941 the Parklawn lands were assessed at $139,000 and the improvements at $1,623,500. The 1941 taxes were unpaid within the time prescribed by the statutes and the City Home Rule charter ordinance applicable, and the city became the owner of the tax sale certificates for the city taxes, and the county in due time became the owner of the tax sale certificates for the county taxes (T. R. 9, 10, 28).

The Federal authorities prior to the acquisition of the lands and the construction of the dwellings, never applied for or received from the Governor of Wisconsin pursuant

to Section 1.03 Wisconsin Statutes, a certificate of consent, and no such certificate was ever issued (T. R. 14, 32).

The petitioners set up as an alternative defense that the respondents should be denied the equitable relief they seek unless and until the Federal agency administering the property enters into an agreement with the state, county and city for the payment, in lieu of taxes, of a fair, reasonable and adequate sum of money, in reasonable proportion to and based upon the costs of the public and municipal services supplied for the benefit of the Parklawn premises and tenants; that no such agreement was ever made; and that in negotiating for such agreement the Housing Administrator under date of March 29, 1938, made an offer to the city alone (T. R. 21-22, 34-46), to pay to the state, county and city in lieu of taxes, the sums of $1,109 for 1937 and $6,970 per annum for the four succeeding years, such amounts to be divided among them as they should agree; and on September 28, 1940, the Housing Administrator renewed said offer without increasing the amounts; and the city declined to accept such offer; and the petitioners asserted that said offers were wholly inadequate, unreasonable, arbitrary and not in keeping with the provisions and intent of the Federal statute applicable (T. R. 15, 32-33). Petitioners further asserted that the Federal authorities were obliged to do equity, failed to do equity, and therefore should be denied any equitable or other relief as demanded in their complaint.

Pending the trial in the District Court the petitioners in 1942 made similar assessments and levies on the Parklawn premises. These 1942 taxes were likewise held invalid by the courts below.

Questions Presented.

1. Whether the Wisconsin taxation exemption statute as amended in 1941 is unconstitutional as applied to United States-owned income-producing real estate administered for the Government by its Federal Public Housing Authority in a proprietary capacity for gain and profit, in the absence of state consent to acquisition and exclusive federal legislation?

2. Whether the offer of the Federal authorities to pay the annual sums in lieu of taxes was so unfair, unreasonable, inadequate, inequitable and not in keeping with the Federal statute applicable, as to constitute a mere arbitrary offer, and be grounds for the denial of the equitable relief sought by respondents?

Reasons Relied On for the Allowance of the Writ.

This controversy presents serious questions, not merely affecting the parties hereto and the particular premises involved, but also important to all the several states and local municipalities. The courts below have relied upon the decision of *M'Culloch* v. *Maryland, et al.*, 4 Wheat. 316, wherein taxation on income-producing real estate was not involved; and on *Van Brocklin* v. *Anderson, et al.*, 117 U. S. 151 (Tenn. 1886), where likewise taxes on income-producing real estate were not involved. *M'Culloch* v. *Maryland* left open the question of taxation on government-owned real estate. The rule in *Van Brocklin* v. *Anderson* is founded upon the supremacy clause of the U. S. Constitution, Art. VI, which holding we respectfully request this court to reconsider.

It is true that *Van Brocklin* v. *Anderson* has stood for the general constitutional provision of tax immunity of United States-owned lands, regardless of the nature or use

thereof or state consent thereto for over 50 years. Petitioners contend, however, that if the United States is to have unconditional tax immunity, it must be grounded upon the separate provision of the U. S. Constitution relating to the acquisition of lands by the U. S. Government in the several states, Art. I, Sec. 8, which provides for exclusive legislation by Congress over its lands only upon the condition precedent that the United States shall have acquired consent of the state legislature.

So far as we can discover, the real meaning of the phrase "exclusive legislation" as used in that constitutional provision as related to real estate taxation, has never been clarified by this court or the inferior courts of the United States. The petitioners contend that this "exclusive legislation" power includes the power to enact tax immunity statutes only when the lands are acquired with consent of the state. The Government contends that Congress has the tax immunity power under the supremacy clause and that the Government in order to have tax immunity on its lands need not have prior state consent and the "exclusive legislation" power under Art. VI.

Petitioners contend further that the United States does not have tax immunity even by a liberal construction of the supremacy clause and that the exclusive legislation power with consent of the state is the express power which limits the United States and is the controlling constitutional provision in the premises.

The *Van Brocklin case* has been cited with approval many times and recently, but in none of such cases was the landlord proprietary capacity for gain and profit element present. The cases cited by respondents holding that the Government has tax immunity under the supremacy clause, in which the *Van Brocklin* decision is cited as authority therefor, involved taxes sought to be imposed by the several

states on United States Bank shares, Federal Land Bank stock, U. S. Bonds, Home Loan Mortgages and as Sales Taxes, and in the latter type of cases the United States court decisions are not wholly uniform.

The law on tax immunity, we respectfully submit, should be settled by this court for rental, income-producing housing projects, because the United States has recently established numerous such housing projects in the several states and it may continue to do so in the future.

If the *Van Brocklin* decision is unsupported by a proper construction of the constitutional provisions applicable, it should not be permitted to stand further as an invasion of the sovereign rights of the several states in which the United States has built or will build similar income-producing enterprises in respect to which the state legislatures are unwilling to grant tax exemption.

The absence of an authoritative final decision of this court on this issue of tax immunity and the resulting confusion in the minds of the Federal authorities on the one hand, and state and local municipal authorities on the other hand, require clarification of this important issue so that Federal, State and local authorities can be guided accordingly.

While Wisconsin may at this time be the only state which has enacted a statute making Federal housing property taxable, the enactment of such a statute may be under consideration in other states and the clarification of the constitutional law involved will be helpful to all concerned.

While the United States will present its own side of this controversy to this court, perhaps by brief in opposition to this petition, it seems to us that the United States authorities should be glad to have this issue settled finally by this court so that they may be governed accordingly in deter-

mining whether or not to continue in or embark further upon Federal housing projects.

The decisions of the courts below both state rather plainly that the brief of the petitioners made an appealing and persuasive argument in support of their contention that the United States could not have tax immunity without state consent. Apparently there was, as there should be, hesitation on the part of these lower courts to overrule *Van Brocklin* v. *Anderson*, or to distinguish that case from the case at bar. It may well be, however, that if the *Van Brocklin* decision had not been made, these lower courts would have held with the petitioners in this case.

The District Court held that the amount of the offer in lieu of taxes was solely for determination by the Public Housing Authority and the amount of the offer, even though very small, was beyond the interference of the court, and further that there was not in the record sufficient evidence upon which it could pass upon the adequacy or inadequacy of the offer. Petitioners contend that the undisputed facts applicable constituted ample evidence upon which the court could pass upon that issue.

The Circuit Court of Appeals on that issue held the authority of the administrator was permissive only and his failure to make more than an arbitrary offer "in lieu of taxes" should not prohibit the injunctional relief.

Petitioners contend further that Congress in the statute relating to payments "in lieu of taxes" intended a fair, reasonable, adequate, equitable sum and not a mere nominal and arbitrary sum.

While the case at bar is an action for declaratory relief, it is also and predominantly an action for equitable relief, and the Government must do equity to obtain equity, and it ought not to have the relief it seeks and the relief the courts below gave it, unless and until in keeping with the

statute in question, it does equity by offering a fair, adequate and reasonable sum.

The question as to whether the United States must do equity and to what extent it must do equity in acting under a statute like the one in question has not, so far as we are aware, been passed upon by this court; the decisions we have been able to find coming entirely from inferior Federal courts and State courts.

WHEREFORE, it is respectfully prayed that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and that the judgment of the courts below may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as may be just and proper; and your petitioners will ever so pray.

Dated at Milwaukee, Wisconsin, this 20th day of March, 1944.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinions below are reported as follows:

District Court:

49 Fed. Supp. 436 (T. R. 37-42).

Circuit Court of Appeals:

139 Fed. (2d) ..... (T. R. 61-65).

Jurisdiction.

Jurisdiction is invoked, as stated in the petition, to review the District Court decree entered April 17, 1943 and the Circuit Court of Appeals decree entered January 20, 1944.

Statement.

The principal facts have already been set forth in the petition. A summary of the argument appears in the index. All of the errors assigned (T. R. 45-46) are intended to be urged.

ARGUMENT.

Sec. 70.11 (1) Wis. Stats., as Amended in 1941, Is Valid.

Prior to the effective date of the amendment all lands owned exclusively by the United States in Wisconsin were by old Sec. 70.11 (1) Wis. Stats. exempt from taxation. The statute as amended effective May 9, 1941 provides:

> "70.11 Property exempt from taxation. The property in this section described is exempt from taxation, to wit:
>
> "(1) That owned exclusively by the United States, *not including, however, any residential, rental income producing, improved real estate owned by the United States or any corporation whose capital stock is owned by the United States government or any corporate or other agency having control and jurisdiction over and administering any such real estate in this subsection above described, which improved real estate has heretofore or may hereafter be acquired by the United States or any such federal corporation or agency.* * * *"

The U. S. Constitution does not expressly grant tax immunity to the United States over lands held by it in the several states. The states alone have sovereign power to grant or ~~delay~~ DENY tax immunity in the absence of a federal constitutional provision to the contrary.

The U. S. Constitution does not impliedly grant such unconditional tax immunity to the United States.

Art. I, Sec. 8 U. S. Const. provides Congress shall have power, among other things, to:

> "* * * provide for the common defense and general welfare of the United States; * * *
>
> "* * *
>
> "*To exercise exclusive legislation* in all cases whatsoever, over such district (not exceeding ten miles

square) as may, *by cession of particular states*, and the acceptance of Congress, become the seat of the government of the United States, and *to exercise like authority over all places purchased by the consent of the legislature of the state* in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and *other needful buildings;*—And

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof." (Emphasis supplied.)

While taxation is an inherent sovereign power of all states, it is also a statutory power under the respective state taxation statutes. Congress adopts its taxation program through legislation. The inherent taxation power of the federal government and state governments can be exercised only through legislation. So the "exclusive legislation" power in Section 8 above would include the power to tax. This exclusive legislative power to tax is, however, granted only with the consent of the state, excepting as related to the District of Columbia. So state consent to such exclusive legislation on taxation matters is a condition precedent to the exercise of that power by the Congress over lands in the several states.

Art. VI, U. S. Const. provides in part:

"* * *

"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

"* * *"

It is under this supremacy clause that respondents assert unconditional United States tax immuity. They

assert such power as an implied power. They assert such unconditional implied power as against the conditional express power, with the consent of the states only, as provided in Section 8 of Article I.

Tax exemptions must be clear and unambiguous.

Pollock v. *Farmers' Loan & T. Co.*, 157 U. S. 439.
Shaffer v. *Carter*, 252 U. S. 37.

These cases and many other cases from this court and the state courts hold that an exemption from taxation, whether perpetual or for a limited term, must be granted in language so clear and unmistakable as to leave no doubt as to the legislative intent and purpose; an exemption provision must be so clear as to leave no room for controversy; the exemption will not be recognized unless granted in terms too plain to be mistaken; and the presumption is always against any surrender of a taxing power; the exemption must not be left to implication or inference; and a well-founded doubt as to tax immunity is fatal to the claim of exemption.

The delegates to the United States Constitutional Convention in the atmosphere of the times, inserted no express or implied U. S. tax freedom immunities. No such immunity was expressly suggested or argued during the constitutional convention.

Madison's Journal of the Constitutional Convention, edited by E. H. Scott, Spec. Ed., published in 1893, containing Madison's notes on all the arguments, discussions, motions and proposed constitutional provisions, 748 pages in length, does not report a single note where United States tax immunity was mentioned by any delegate.

President Madison submitted his notes to each speaker at the close of each day's session, or soon thereafter, and procured the approval from each speaker of his notes as

to their remarks. If it were ever intended by the framers that the United States should have such tax immunity without state consent, that proposition would have been debated at length and the arguments pro and con of the delegates reported, so that the clear intent and action of the delegates one way or another would have been shown.

The state statute must be construed, if fairly possible, to avoid unconstitutionality. It is presumed to be constitutional and the burden is on respondents to negative every conceivable basis which might support the constitutionality of the statute. ~~Citing~~ *United States* v. *LaFranca*, 282 U. S. 568; *Madden* v. *Kentucky*, 309 U. S. 83.

United States tax freedom would violate the cardinal principle of state sovereignty, constitute a power to destroy the states and local communities, and no such federal power was ever intended by the framers.

The Supremacy Clause Properly Construed Does Not Grant Federal Tax Immunity.

A tax immunity constitutional provision must be clear and unmistakable. It could not rest on implication or presumption. It does not exist unless the states grant such tax exemption by particular consent in respect to particular parcels of real estate acquired by the United States.

If the constitution expressly requires state consent for exclusive legislation by the United States and its power to provide for tax exemption of its lands, for forts, magazines, arsenals and dry-docks, how can it be said that such tax exemption exists in reference to federal housing projects?

The "needful buildings" mentioned in Section 8 of Article I mean and include post offices, federal court houses, customs houses and similar essential federal buildings

erected and maintained for the performance of essential governmental functions, and do not mean and include low rent housing projects such as Parklawn. State consent even for such "needful buildings" is a prerequisite.

If states were to be prohibited by the constitution from taxing federally owned lands, in respect to which they have not granted consent to tax freedom, it would have been very easy for the framers of the constitution to include in Article I, Section 10, along with the other prohibitions upon the states, a prohibition against the taxation of federal real estate.

The Tenth amendment provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It follows that the power of tax immunity does not exist because not delegated either expressly or impliedly to the United States, and it therefore is reserved to the states or the people.

If unconditional tax immunity be of grave importance to the United States, it can be obtained only by a constitutional amendment, with the consent of the states.

If the United States has tax immunity under the supremacy clause, why should Congress exact of the states as a condition of admission a tax immunity constitutional provision? Exaction of tax immunity clauses from the later states constitutes a discrimination against those states and in favor of the thirteen original colonies, and it violates Art. IV, Sec. 3, U. S. Constitution, requiring admission of all states to the union on a uniform and equal footing.

Upon this transcendent power of taxation there can be no divided sovereignty as between the United States and

the several states. The power of taxation lies with the states, and the states alone, and not with the United States.

In *State Tax Commission of Utah* v. *Aldrich, et al.*, 316 U. S. 174, involving the issue of the right of the State of New York to impose inheritance taxes on shares of stock in a Utah corporation, Mr. Justice Frankfurter, concurring in the majority opinion, at page 182 says, among other things:

> "The taxing power is an incident of government. It does not derive from technical legal concepts. The power to tax is coextensive with the fundamental power of society over the persons and things made subject to tax. Each State of the Union has the same taxing power as an independent government, except insofar as that power has been curtailed by the Federal Constitution.
>
> "The taxing power of the States was limited by the Constitution and the original ten amendments in only three respects: (1) no State can, without the consent of Congress, lay any imposts or duties on imports or exports, except as necessary for executing its inspection laws, Art. I, Sec. 10 (2); (2) no State can, without the consent of Congress, lay any tonnage duties, Art. I, Sec. 10 (3); and (3) by virtue of the Commerce Clause, Art. I, Sec. 8 (3), no State can tax so as to discriminate against interstate commerce. (For present purposes I put the Contract Clause to one side.)"

The Justice includes here no express, implied or incidental constitutional power of real estate tax immunity in the United States, nor does he indicate that any power of the sovereign states so to tax non-consent U. S. lands is lacking.

Consent of the State Is a Condition Precedent to United States Tax Immunity.

We have presented our argument on the necessity of state consent above.

It is admitted that the United States did not have the consent of the state to acquire and exercise exclusive legislation over the Parklawn housing project premises.

Sec. 1.01 Rev. 1941 Stats. provides in part:

> "*State sovereignty and jurisdiction.* The sovereignty and jurisdiction of this state extend to all places within the boundaries thereof as declared in the constitution, subject only to such rights of jurisdiction as have been or shall be acquired by the United States over any places therein; and it shall be the duty of the governor, and of all subordinate officers of the state, to maintain and defend its sovereignty and jurisdiction. * * *"

Sec. 1.02 W. S. provides:

> "*United States sites and buildings.* Subject to the conditions mentioned in section 1.03 the legislature hereby consents to the acquisitions heretofore effected and hereafter to be effected by the United States, by gift, purchase or condemnation proceedings, of the title to places or tracts of land within the state; and, subject to said conditions, the state hereby grants, cedes and confirms to the United States exclusive jurisdiction over all such places and tracts. Such acquisitions are limited to the following purposes:
>
> "(1) To sites for the erection of forts, magazines, arsenals, dockyards, custom houses, courthouses, post offices, or other public buildings or for any purpose whatsoever contemplated *by the seventeenth clause of section eight of article one of the constitution of the United States.*
>
> "(2) To a tract of forty thousand acres of land in township 17 and 18 north, ranges 2 and 3 west, near

Sparta, in Monroe County, to be used for military purposes as a target and maneuver range and such other purposes as the war department may deem necessary and proper.

"(3) To erect thereon dams, abutments, locks, lockkeepers' dwellings, chutes, or other structures necessary or desirable in improving the navigation of the rivers or other waters within and on the borders of this state."

Sec. 1.03 W. S. provides:

"*Concurrent jurisdiction over United States sites; conveyances.* The conditions mentioned in section 1.02 are the following *conditions precedent*:

"(1) That an application setting forth an exact description of the place or tract so acquired shall be made by an authorized officer of the United States to the governor, accompanied by a plat thereof, and by proof that all conveyances and a copy of the record of all judicial proceedings necessary to the acquisition of an unincumbered title by the United States have been recorded in the office of the register of deeds of each county in which such place or tract may be situated in whole or in part.

"(2) That the ceded jurisdiction shall not vest in the United States until they shall have complied with all the requirements on their part of sections 1.02 and 1.03 and shall continue so long only as the place or tract shall remain the property of the United States.

"(3) That the state shall forever retain concurrent jurisdiction over every such place or tract to the extent that all legal and military process issued under the authority of the state may be served anywhere thereon, or in any building situate in whole or in part thereon."

The constitutionality of these state statutory provisions must be presumed. The burden is on the respondents to demonstrate their invalidity.

The Congress on three occasions has recognized that state consent to exclusive legislation and consequent tax freedom is necessary.

(1) In 1838 Congress enacted Title IV, sec. 11, U. S. C. A. providing:

> "The President of the United States is authorized to procure the assent of the legislature of any State, within which any purchase of land has been made for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, without such consent having been obtained."

(2) The Congress in 1841 adopted a resolution, later made a statute, Title 40, Chap. 3, sec. 255, U. S. C. A., which as amended June 28, 1930 provides in part:

> "No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, *or other public buildings of any kind whatever*, until the written opinion of the Attorney General shall be had in favor of the validity of the title, *nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given.* • • •"

This statute forbids the expenditures of public moneys on lands purchased by any officer or department until, among other things, state consent has been procured. This statute was in effect in 1935 when the United States bought Parklawn, and during the next two years when the houses were constructed.

(3) This section was later amended February 1, 1940, when the following was added:

> "• • • • •
>
> "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; *but*

the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interest therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the States where such lands are situated. *Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."*

This amendment became effective 5 years after the Government bought Parklawn and is now in force as no change was effected by the amendment approved October 9, 1940. Under the original statute, prior to the 1930 and other amendments, the U. S. Attorney General in Vol. 10, Op. Atty. Gen. 34 (1861) held:

> "There is nothing in the Constitution which prohibits the United States purchasing land within a state without the consent of the state legislature; but when land is purchased by them in a state without such consent the United States cannot exercise 'exclusive legislation' over the place."

The Attorney General in the same opinion further ruled:

> "If the state legislature, *for any or no assigned reason,* withhold its consent to a purchase of the site, then the government has tied its own hands. It may purchase and hold the land to be used; it may stand in the most pressing need of a fort, a lighthouse, or a post office, upon the spot, and yet it cannot spend a dollar of public money upon the site for the erection of the necessary building thereon."

In 12 Op. Atty. Gen. 428 (1868) the Attorney General ruled:

> "Accession of jurisdiction over land purchased by the United States by a constitutional convention of a state is not a consent to the purchase by the Legislature."

In the case at bar the Wisconsin legislature has authorized the Governor to grant the consent, but no application therefor has been made.

It may well be further argued that constitutional consent, such as that in Art. II, sec. 2 of the Wis. Const., does not comply with the legislative consent required by Art. I, sec. 8, clause 17 of the U. S. Const. This would make all the more infirm the position of respondents and the ruling of the trial court that the Wis. Const. forbids taxation of Parklawn.

In *U. S.* v. *Cornell* (Fed. Cas. No. 14,867) C. C. R. I. 1819, it was held:

> "The purchase of lands by the United States for public purposes, within the territorial limits of a state, does not of itself oust the jurisdiction of such state over the lands purchased."

In *Ryan* v. *State*, 61 P. (2d) 1276 (Wash.) it was held that the United States acquires exclusive jurisdiction only with the consent of the particular state.

The U. S. Dist. Court, for Minnesota, Sixth Division, by Joyce, District Judge, on April 28, 1942, in the case of *United States* v. *1749.06 Acres of Land, et al*, and four other companion cases, by memorandum order (not reported) held that under the Minnesota Stats. relating to state consent to the acquisition and holding of lands in Minnesota, as amended in 1941, the U. S. could not condemn said lands because the Governor of Minnesota had not given the state's consent and that the Governor could

refuse such consent under the statute if he deemed the consent to the acquisition inconsistent with the best interests of the state. Upon objections of the State of Minnesota and others the petition for condemnation was dismissed. The state consent requirement cannot be meaningless; it has force, must be recognized, and controls over any implied or incidental powers derived by construction.

The Van Brocklin Decision Should Not Rule the Case at Bar Adversely to the Petitioners.

The real estate involved in the *Van Brocklin case* was acquired by the government as an incident to the exercise of its regular governmental functions. In the case at bar the United States, as held in *U. S.* v. *Brown, Clerk of Ct., Flagler Co., Fla.*, 41 Fed. Supp. 838, was engaged in a purely commercial enterprise and was exercising no sovereign function; the government in the Florida case became a partner in a trading company, in the agriculture mortgage loan business, and divested itself of its sovereign character and took on that of a private citizen, and it descended to the level of those with whom it associated (Citing *U. S.* v. *Strang*, 254 U. S. 491, 41 S. Ct. 165, 65 L. Ed. 368).

The government in the case at bar engaged in business in its proprietary capacity, became a landlord and does business with its tenants and charges and accepts rentals for the possession and use of the 518 dwelling units involved.

In *Columbus Metropolitan Housing Authority* v. *Thatcher*, 42 N. E. (2d) 437 (Ohio) at 442, it was held "that where the dwellings are leased to family units for the purposes of private homes, the use of such dwelling is private and not public."

In *U. S.* v. *Certain Lands in Louisville*, 78 Fed. (2d) 684, it was held that real estate for public housing projects cannot be acquired by condemnation because they serve no public purpose.

The *Van Brocklin* decision is primarily founded on *M'Culloch* v. *Maryland, et al.*, 4 Wheat. 316, a case involving the right of a state to impose a tax on the shares of the U. S. bank. No real estate taxes were there involved and in the last paragraph of the opinion the court expressly stated that the opinion did not pass upon the real estate tax exemption issue.

It seems to us that the *Van Brocklin* opinion should be limited in its application to taxes other than real estate taxes, or in the alternative that decision should be reversed, as not sustained by proper construction of the constitutional provisions applicable, or in the further alternative, that the case at bar should be distinguished from the *Van Brocklin* case because of the peculiar facts and circumstances involved, and more especially because of the proprietary landlord status of the United States.

If the *Van Brocklin* decision stands the Congress would have an unlimited power of tax immunity. It would constitute a power to invade without restraint the sovereign power of the several states and their local communities. The United States could build 100 Parklawns in Wisconsin, or even in one city, Milwaukee, with an assessed valuation of $182,300,000 and thus deprive the state, city and county of $6,700,000 in annual taxes, a vast sum, and compel the state, city and county to furnish governmental, judicial, educational and other services to 51,800 families who would receive these benefits without sharing in the expenses incident thereto. Likewise, it could build a Parklawn project for 518 families in a suburban village with a population of about 2,000, about the same as the Parklawn

population, and compel the taxpaying half of the village to support the other half. It is not a sufficient answer to say that the United States would not do these things. The issue is: Does it have the unlimited power to do so? Such action might well cripple and almost destroy the normal state, city, county and village functions. No such power of state and local community crippling or destruction was ever contemplated or created. In disposing of this the theoretical possibilities of many such projects must be considered to settle properly the principle at issue.

The Nominal Offer of the Housing Authority Is So Arbitrary, Unfair, Unreasonable, Inadequate and Inequitable and in Violation of the Plain Purpose of the Statute in Question as to Be Ample Grounds for Denial of the Equitable Relief Sought by Respondents.

The administrator offered, and renewed his offer, to pay $1,109.00 for 1937 and $6,970.00 for the succeeding four years. This is roughly about five per cent of the annual gross rentals of $135,000.

Section 2 of Public Act No. 837, 74th Congress, approved June 29, 1936, provides:

> "Section 2. Upon request of any state or political subdivision in which project has been or will be constructed, the Federal Administrator of Public Works is authorized to enter into an agreement, and to consent to the renewal or alteration thereof with such states or subdivisions for the payment by the United States of sums in lieu of taxes. *Such sums* shall be fixed in such agreement and *shall be based upon the cost of the public or municipal services to be supplied for the benefit of such project or the persons residing on or occupying such premises*, but taking into consideration the benefits to be secured by such state or subdivision from such project." (Emphasis supplied.)

The provisions, so far as material here, were not later appreciably amended by the 1937 Housing Act No. 412, 75th Cong., approved Sept. 1, 1937, but the amendment did contain a provision to the effect that the sums paid in lieu of taxes should not exceed the taxes that would be paid to the state or local subdivisions upon such property if it were not exempt from taxation.

The Congress did not intend any nominal sum.

Notwithstanding the trial court's holding to the contrary, we submit these undisputed facts are sufficient under this statute for interference by the court, and that these nominal offers should be frowned upon and require denial of the equitable relief asked by the Government.

Congress delegated some discretion to the Housing Administrator in negotiating the "in lieu" agreement, but it delegated only reasonable discretion. The administrator would retain about 95% of the rentals and saddle the government expenses upon the state and the local governments.

In the *Village of Cedar Springs* v. *Schlick, et al.*, 45 N. W. 994 (Mich.), where village sought relief in equity, the court held:

> "* * * The maxim, 'He that hath committed inequity shall not have equity,' applies with singular force to the conduct of the complainants in this case. A court of equity will leave these complainants, the people of the village, and the defendant railroad company in the bed they have deliberately made, and to such defense as a court of law may find they are entitled to."

Substantially the same rule was applied in *Markley* v. *Village of Mineral City*, 51 N. E. 28 (Ohio).

In *State of Iowa* v. *Carr et al.*, 191 Fed. 257, the State of Iowa made a claim in a suit of equity to some land that the defendant, Carr, had in his possession for more than

20 years. The court held that although a mere delay "does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances."

> "*The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances.* (Citing a number of cases.) Thus a state is estopped from ousting a city organized under a void law after the city has been exercising its assumed powers for only four years, but has levied and collected taxes and assessments, constructed bridges and streets, and made other improvements meanwhile without protest or objection on the part of the state. *State* v. *City of Des Moines*, * * * 65 N. W. 818 (Ia.)"

Here the state for 20 years collected taxes on this land. Equity barred it from recovery in view of all of the circumstances.

The Iowa court at page 268 quotes from *U. S.* v. *Chandler-Dunbar Water Power Co.*, 152 Fed. 25:

> "'* * * But when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another.'"

The facts in *U. S.* v. *James Stinson, et al.*, 197 U. S. 200, were very much akin to the facts in the case of *State of Iowa* v. *Carr*, 191 Fed. 257. Here the United States did not begin its action for the recovery of land until 40 years after the original fraud. Six of the fourteen preempters were then dead. One of the living was failing in memory. The Supreme Court would not act in granting relief to the United States, stating that too long a time had run.

In *Pan American Petroleum & Transport Co.* v. *U. S.*, 273 U. S. 456, involving a large sum of money pursuant to a contract obtained through corrupt practice, the court at page 506 says:

> "In suits brought by individuals for rescission of contracts the maxim that he who seeks equity must do equity is generally applied, so that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. * * * *The general principles of equity are applicable in a suit by the United States to secure the cancellation of a conveyance or the rescission of a contract.*" (Citing a number of cases.)

See also:

Causey v. *U. S.*, 240 U. S. 399.
Heckman v. *U. S.*, 224 U. S. 413; and
U. S. v. *Trinidad Coal & Coking Co.*, 137 U. S. 160.

In a case where the National Prohibition Act was alleged to be violated, *Olmstead* v. *United States*, 277 U. S. 438, the court considered wire tapping was proper search and seizure. The *dissent* written by Justice Brandeis (concurred in by three other Justices) on pp. 483-484 states:

> "Will this court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of un-

clean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling."

Parklawn accommodates 518 families. The annual rentals are $135,000. The annual cost to the city for the services rendered to the Parklawn residents is $130,000, derived in large part from real estate taxes; the County and State spend additional substantial sums each year in furnishing general governmental administration and numerous other services for the benefit of the Parklawn tenants.

The Parklawn property valued at $1,762,500 receives police and fire protection. The taxes as levied would amount only to about $131.18 per family per year. The enterprise is not a slum clearance, public health enterprise. It is a low cost housing venture. Under our view such use should not be material or controlling. Several hundred children attend the public schools without the payment of tuition.

The Congress did not intend any nominal sum. It intended a fair and reasonable sum based upon the costs of the public services rendered and the benefits to the project and the occupants of the premises.

It is respectfully submitted that there was evidence (facts admitted by the motions) before the trial court and the appellate court below upon which to determine the adequacy or inadequacy of the offer and that the offer was arbitrary and so unfair, unreasonable, inadequate and inequitable as to be ample grounds for denying the equitable relief to plaintiffs and that the offer was not for the sole determination of the administrator and beyond judicial interference.

The statute above contemplates an agreement between the federal authorities and the state and local authorities and that presupposes that both sides will be fair and reasonable and a reasonable sum actually offered and agreed upon.

Conclusion.

In view of the foregoing, it is respectfully submitted that a writ of certiorari should be granted and this court should review the decision of the Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

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No. 316

In the Supreme Court of the United States

OCTOBER TERM, 1943

CITY OF MILWAUKEE, J. J. KRUEGER, CITY TREASURER OF THE CITY OF MILWAUKEE, COUNTY OF MILWAUKEE, AND C. M. SOMMERS, COUNTY TREASURER OF MILWAUKEE COUNTY, PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 816

CITY OF MILWAUKEE; J. J. KRUEGER, CITY TREASURER OF THE CITY OF MILWAUKEE; COUNTY OF MILWAUKEE; AND C. M. SOMMERS, COUNTY TREASURER OF MILWAUKEE COUNTY, PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 37–42) is reported in 49 F. Supp. 436. The opinion of the circuit court of appeals (R. 61–65) is reported in 140 F. 2d 286.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered on January 20,

1944 (R. 66). The petition for writ of certiorari was filed on March 27, 1944. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925.

QUESTION PRESENTED

Whether land owned by the United States through the Federal Public Housing Authority, used as a site for a low-cost housing project, over which exclusive jurisdiction has not been obtained, but which Congress has declared to be immune from state and local taxation, is subject to an *ad valorem* property tax imposed by the State of Wisconsin and its political subdivisions.

CONSTITUTIONS AND STATUTES INVOLVED

The pertinent provisions of the United States Housing Act of 1937, 50 Stat. 888, 42 U. S. C., secs. 1401–1430, together with the pertinent provisions of Art. II, sec. 2 of the Wisconsin Constitution, and c. 86, Wisconsin Laws of 1941, sec. 70.11 (1), are set out in the Appendix, *infra*, pages 13–16.

STATEMENT

Pursuant to authority granted in Title II, sec. 203 of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 201, 40 U. S. C., secs. 402, 403, the Administrator of that Act, in 1935, purchased for the United States certain land located in the City of Milwaukee as a site for construc-

tion of a low-cost housing and slum-clearance project (R. 5–23). Construction of the project was initiated by the Administrator, but completed by the United States Housing Authority,[1] a governmental agency created under the United States Housing Act of 1937, 50 Stat. 888, 42 U. S. C., secs. 1401–1430, for the purpose of coordinating all governmental housing activities.

In the 1937 Act, Congress declared its policy to promote the general welfare by assisting the several states in eliminating unsafe and unsanitary housing conditions "injurious to the health, safety, and morals of the citizens of the Nation" (sec. 1, 42 U. S. C., sec. 1401). The Act created the United States Housing Authority as an instrumentality of the United States and provided that all existing federal projects should be transferred to and administered by that agency (sec. (d), 42 U. S. C., sec. 1404 (d). The Act contemplated that all existing federal projects, where possible, should be sold or leased to state housing agencies (sec. 12, 42 U. S. C., sec. 1412 (a)), but the Authority was also given the right to administer the projects directly (sec. 4 (d), 42 U. S. C. sec. 1404 (d) and sec. 12 (a), 42 U. S. C., sec. 1412 (a).[2]

[1] Now known as the Federal Public Housing Authority. The change of name is provided for in Executive Order No. 9070, dated February 24, 1942 (7 F. Reg. 1529). The two names will be used herein interchangeably.

[2] In the main, the early federal projects have now been conveyed or leased to local housing authorities, as provided in the Act. Despite the fact that Wisconsin has a local

The Act specifically provides for tax exemption as follows (sec. 5 (e), 42 U. S. C., sec. 1405 (e)):

> The Authority, including but not limited to its franchise, capital, reserves, surplus, loans, income, assets, and property of any kind, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, county, municipality, or local taxing authority. Obligations, including interest thereon, issued by public housing agencies in connection with low-rent-housing of slum-clearance projects, and the income derived by such agencies from such projects, shall be exempt from all taxation now or hereafter imposed by the United States.[3]

In the same Act, Congress provided that the Authority should have power to enter into agreements to pay sums "in lieu of taxes" with respect to any of its real property (42 U. S. C., sec. 1413 (c)).

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housing law (sec. 66.40, Wis. Stat. 1943), no local housing agency has ever been established in Milwaukee. Consequently, this project has at all times been administered directly by the Federal Public Housing Authority and in this sense does not present a typical situation.

[3] The original National Industrial Recovery Act under which this land was purchased and construction started did not contain a specific declaration that land acquired by the Federal Emergency Administrator of Public Works should be tax-exempt. That Congress intended and presumed it would enjoy the usual federal immunity, however, is indicated by the fact that provision for payment of sums in lieu of taxes was made in section 2 of the Act of June 29, 1936, 49 Stat. 2026, 40 U. S. C., sec. 422, a provision which would obviously be unnecessary if the property was itself taxable.

Thereafter, Executive Order No. 7732, effective November 1, 1937, 2 Fed. Reg. 2324, 40 U. S. C., sec. 401, note, transferred to the United States Housing Authority "all right, interest, and title held by the Federal Emergency Administration of Public Works in any housing or slum-clearance projects constructed or in the process of construction on the date of enactment of the said Act." [4]

In March, 1938, the United States Housing Authority offered to pay the City of Milwaukee in lieu of taxes the sum of $1,109.00 for the year 1937 and the sum of $6,970.00 for 1938 and the four succeeding years. In September, 1940, the offer was renewed (R. 15, 33). The figure $1,109.00 represented $^7/_{12}$ths of the annual taxes which were formerly assessed against the land comprising the project site. For the year 1937 only $^7/_{12}$ths of the former assessment was offered because the project had been occupied for only seven months of that year. The figure $6,970.00 offered for subsequent years represented 5 percent of the annual gross rent roll, less 5 percent

[4] Since the title to any property acquired by the Federal Emergency Administration of Public Works was in the United States, the effect of this Executive Order was to transfer the technical title to the property here involved to the United States Housing Authority. However, for tax purposes, there is no distinction between property owned by the United States and property owned by the United States Housing Authority. *Clallam County* v. *United States*, 263 U. S. 341, 345; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477.

of the estimated cost of heat, hot water and electricity (R. 21, 34–36).[5] On both occasions the City refused to accept this offer of payment on the ground that it was inadequate (R. 15, 33).

With the parties thus in disagreement, the Legislature of Wisconsin on May 7, 1941, enacted c. 86, Wis. Laws 1941, specifically providing that property of the United States should not be exempt if used for residential, rental income-producing purposes (R. 26–27, Appendix, *infra*, pp. 15–16). For the 1941 tax year, county taxes in the sum of $23,591.95 and city taxes in the sum of $44,066.00 were assessed against the property (R. 3, 11, 28), and the defendants admitted that they intend to assess and levy taxes against this property for future years (R. 11, 27–29). To have these existing taxes declared void and to enjoin future taxation, the present suit was brought (R. 2–4). The district court granted the requested relief (R. 42–43) and the circuit court of appeals affirmed (R. 66).

[5] In administering and fixing rentals for the project, the Federal Public Housing Authority carries out the directions of Congress embodied in section 12 (e) of the Act (42 U. S. C., sec. 1412 (e), as follows: "In the administration of any Federal low-rent-housing project pending sale or lease, the Authority shall fix the rentals at the amounts necessary to pay all management, operation, and maintenance costs, together with payments, if any, in lieu of taxes, plus such additional amounts as the Authority shall determine are consistent with maintaining the low-rent character of such project."

ARGUMENT

1. Petitioners do not attack the general constitutionality of the United States Housing Act of 1937, wherein Congress has provided for the establishment of low-cost housing projects and has expressly declared that property of the United States Housing Authority should be tax-exempt. Therefore the case falls squarely within the decisions of this Court in *Pittman* v. *Home Owners' Loan Corporation,* 308 U. S. 21, 32, and *Federal Land Bank* v. *Bismarck Co.,* 314 U. S. 95, 103. As the governmental activity involved is indisputably valid, the power of Congress to declare that activity tax-exempt follows as a matter of course. Cf. *Maricopa County* v. *Valley National Bank,* 318 U. S. 357; *Van Allen* v. *Assessors,* 3 Wall. 573.

2. Petitioners ask (Pet. 7–9) that *Van Brocklin* v. *Tennessee* (sometimes cited by them as *Van Brocklin* v. *Anderson*), 117 U. S. 151, holding federal real property exempt from state taxation, be re-examined and overruled, or in the alternative that the rule of that case be held inapplicable to "income-producing real estate" of the United States. Since, however, the property herein involved was expressly declared exempt by Congress, no question of an implied exemption, such as in the *Van Brocklin* case, is presented. In any event, in the 57 years since that case was decided, this Court has repeatedly reaffirmed the principle that real property owned by the United States or

its instrumentalities enjoys a constitutional immunity from state taxes in the absence of the consent of Congress. See *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643, 645; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, 91; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; cf. *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *Irwin* v. *Wright*, 258 U. S. 219; *United States* v. *Alabama*, 313 U. S. 274, 279; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481. In fact, *Van Brocklin* v. *Tennessee* was cited with approval as late as the last term of this Court. *Mayo* v. *United States*, 319 U. S. 441, 447. Petitioners' contention that a federal activity may be valid but nevertheless taxable where it is of a proprietary nature, has already been rejected (*Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Loan Corporation*, 308 U. S. 21, 32; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 101–102) and furnishes no reason for re-examining *Van Brocklin* v. *Tennessee*. Cf. *City of New Brunswick* v. *United States*, 276 U. S. 547.

3. Petitioners also contend that the Federal Government's immunity from taxation by the states should be applicable only in areas over which the United States has acquired exclusive jurisdiction.[6]

[6] It is conceded that the United States does not have exclusive jurisdiction over the Milwaukee project. Sec. 1 of the Act of June 29, 1936, 49 Stat. 2026, 40 U. S. C., sec. 421, and sec. 13 (b) of the Act of September 1, 1937, 50 Stat. 888, 894, 42 U. S. C., sec. 1413 (b) both provide that exclusive jurisdiction shall not be obtained over low-cost housing areas.

The argument on this point is developed (Pet. 13–24) by noting that under Art. I, sec. 8, cl. 17 of the Constitution of the United States, exclusive jurisdiction can be obtained only with the consent of the state; that consequently the state's sovereign right to tax can be considered nonexistent only in those areas where the rights of the United States have attached by state consent. This contention would overturn 125 years of history, for it is basically inconsistent with *McCulloch* v. *Maryland,* 4 Wheat. 316. Its most recent refutation is in *Mayo* v. *United States,* 319 U. S. 441, 447, where this Court said: "A state cannot tax land of the United States situated within the state even though the state has not ceded sovereignty to the United States."

More fundamentally, this argument misconceives the purpose of the "exclusive legislation" clause in the Constitution. That clause was added merely to permit the United States to administer particular areas independently of any concurrent state jurisdiction. To eliminate that concurrent jurisdiction, state consent or cession is necessary. Cf. *James* v. *Dravo Contracting Co.,* 302 U. S. 134. Moreover, the federal government can acquire exclusive jurisdiction, concurrent jurisdiction or partially exclusive jurisdiction over land within the states wholly without reliance on Art I, sec. 8, cl. 17. *Collins* v. *Yosemite Park Co.,* 304 U. S. 518, 529–530.

Congress has recently acted to narrow considerably the instances in which exclusive jurisdiction is obtained even under all-inclusive state consent statutes. Act of February 1, 1940, 54 Stat. 19, as amended by the Act of October 9, 1940, 54 Stat. 1083.[7] If petitioners' contention were correct, all government property, real or personal, within any concurrent jurisdiction area, would be subject to state taxation even though this would mean that large amounts of Army equipment, all federal internal revenue collections on deposit in local banks, and even such minutiae as office equipment, could be taxed if the state so desired.

4. Petitioners imply (Pet. 4–5, 25–26, 30) that the state will be deprived of vital tax revenues and saddled with innumerable burdens unless the Federal Government's tax immunity is restricted to areas where the United States has exclusive jurisdiction. This matter was presumably considered by Congress when it expressly declared federal slum clearance projects exempt from state taxation. Furthermore, the over-all burden on the state is not severe; occupants of these low-cost housing projects are liable for sales taxes, license taxes, personal property taxes, etc.; and the elimination of slum areas effectively combats the conditions that cause disease and crime, thus re-

[7] See *Adams* v. *United States*, 319 U. S. 312; *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 101, note 11; *State* v. *Shepard*, 239 Wis. 345, 300 N. W. 905 (1941).

ducing the amounts heretofore expended by the state and its political subdivisions for police and health protection.

5. Although not relied upon by either of the courts below, this property is also exempt under Art. II, sec. 2 of the Wisconsin Constitution, which provides that "no tax shall be imposed on land the property of the United States" (Appendix, *infra,* pp. 14–15). Since the effect of c. 86, Wis. Laws 1941 (Appendix, *infra,* pp. 15–16), is to violate this constitutional provision, it would seem to be clearly invalid as a matter of state constitutional law. Nor is there a single Wisconsin case which would indicate that this provision would be interpreted as requiring anything more than the mere vesting of title in the United States. Cf. *Mariner* v. *Oconto Land Co.,* 142 Wis. 531, 542, 126 N. W. 34 (1910); *Aberg* v. *Moe,* 198 Wis. 349, 356, 224, N. W. 132 (1929).

6. Finally, petitioners urge that the sums offered in lieu of taxes were inadequate, and for this reason the district court should have refused to grant equitable relief. This is in effect an argument that the United States must pay taxes before it is entitled to an adjudication that its property is tax-exempt. Both lower courts properly refused to consider this contention because, under the Federal statute, payment of sums in lieu of taxes under the United States Housing Act of 1937 is merely permissive, and an exclusive matter for administrative determination.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1944.

APPENDIX

Sec. 1 of the Act of September 1, 1937, c. 896, 50 Stat. 888, provides:

> It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation.

Sec. 3 (a) of the Act of September 1, 1937, c. 896, 50 Stat. 888, 889, provides in part:

> There is hereby created in the Department of the Interior and under the general supervision of the Secretary thereof a body corporate of perpetual duration to be known as the United States Housing Authority, which shall be an agency and instrumentality of the United States.

Sec. 5 (e) of the Act of September 1, 1937, c. 896, 50 Stat. 888, 890, provides in part:

> The Authority, including but not limited to its franchise, capital, reserves, surplus, loans, income, assets, and property of any kind, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, county, municipality, or local taxing authority. Obligations, including interest thereon, issued by public hous-

ing agencies in connection with low-rent-housing or slum-clearance projects, and the income derived by such agencies from such projects, shall be exempt from all taxation now or hereafter imposed by the United States.

Sec. 13 of the Act of September 1, 1937, c. 896, 50 Stat. 888, 894, provides in part:

> (b) The acquisition by the Authority of any real property pursuant to this Act shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property; and, insofar as any such jurisdiction may have been taken away or any such rights impaired by reason of the acquisition of any property transferred to the Authority pursuant to section 4 (d), such jurisdiction and such rights are hereby fully restored.
>
> (c) The Authority may enter into agreements to pay annual sums in lieu of taxes to any State or political subdivision thereof with respect to any real property owned by the Authority. The amount so paid for any year upon any such property shall not exceed the taxes that would be paid to the State or subdivision, as the case may be, upon such property if it were not exempt from taxation thereby.

Art. II, sec. 2 of the Wisconsin Constitution, provides:

> The propositions contained in the act of congress are hereby accepted, ratified and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this state

shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in such soil to bona fide purchasers thereof; and no tax shall be imposed on land the property of the United States; and in no case shall nonresident proprietors be taxed higher than residents. Provided, that nothing in this constitution, or in the act of congress aforesaid, shall in any manner prejudice or affect the right of the state of Wisconsin to five hundred thousand acres of land granted to said state, and to be hereafter selected and located by and under the act of congress entitled "An act to appropriate the proceeds of the sales of the public lands, and grant pre-emption rights," approved September fourth, one thousand eight hundred and forty-one.

C. 86, Laws of Wisconsin 1941, provides:

SECTION 1. Subsection (1) of section 70.11 of the statutes is amended to read:

(70.11) (1) That owned exclusively by the United States, *not including, however, any residential, rental income producing, improved real estate owned by the United States or any corporation whose capital stock is owned by the United States government or any corporate or other agency having control and jurisdiction over and administering any such real estate in this subsection above described, which improved real estate has heretofore or may hereafter be acquired by the United States or any such federal corporation or agency,* or by this state except lands contracted to be sold by the state and except state lands hereinafter provided; but lands purchased

by counties at tax sales shall be exempt only in the cases provided in section 75.32. No real estate belonging to or held in trust for the state which is exempt from taxation shall be subject to special taxes or assessments for local improvements, any different or inconsistent provision in any city charter notwithstanding. Whenever at the time of the conveyance of any land to the state or as a consideration thereof, the state or any person, firm, or corporation holding such land for the state leases or creates any beneficial interest equivalent to a lease of such land or part thereof to or for the grantor, the exemption provided in this subsection shall not apply to such land or part thereof during the term of such lease or interest, unless such land or part thereof is used for public purposes; except that this provision shall not apply to any property already acquired or for acquisition of which negotiations pending at the time this subsection takes effect, and which shall be acquired prior to October 1, 1933, nor to any property acquired from any municipal corporation. *The provisions of this subsection in force and effect prior to the adoption of this amendment (1941) shall not be construed to have exempted from taxation any such residential, rental income producing, improved real estate in this state heretofore owned exclusively by the United States or by any corporation the capital stock of which is owned by the United States, or any such real estate administered by any federal agency, corporate or otherwise.*

SECTION 2. This act shall take effect upon passage and publication.

Approved May 7, 1941.

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